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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHAEL ALONZO HARVEY, JR.,) Case No. 10cv02235 JAH(RBB)
12)
13) Petitioner,) **REPORT AND RECOMMENDATION**
14) **DENYING PETITION FOR WRIT OF**
15) **HABEAS CORPUS [ECF No. 1]**
16)
17) v.)
18) F. GONZALES et al.,)
19)
20) Respondents.)
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17 Petitioner Michael Alonzo Harvey, Jr., a state prisoner
18 proceeding pro se and in forma pauperis, filed a Petition for Writ
19 of Habeas Corpus on October 27, 2010, pursuant to 28 U.S.C. § 2254
20 [ECF Nos. 1, 3].¹ First, Petitioner contends that relief is
21 warranted because the trial court erred in admitting evidence of
22 Harvey's parole status. (Pet. 6, ECF No. 1.) Second, Harvey
23 argues that there was insufficient evidence to support his
24 kidnapping for robbery conviction on the theory presented to the
25 jury. (Id. at 9-10.) Harvey also names Warden F. Gonzales and
26 Attorney General Edmund G. Brown, Jr. as Respondents. (Id. at 1.)
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¹ Because Harvey's Petition is not consecutively paginated, the Court will cite to it using the page numbers assigned by the electronic case filing system.

1 On January 5, 2011, Respondent's Answer to Petition for Writ
2 of Habeas Corpus was filed, including a Memorandum of Points and
3 Authorities and a Notice of Lodgment [ECF No. 6]. The Attorney
4 General of the State of California asserts that it is not a proper
5 respondent and should therefore be dismissed. (Answer 1 n.1, ECF
6 No. 6.) Warden Gonzales alleges that Harvey's claim for
7 evidentiary error in ground one fails because it is unexhausted and
8 does not present a federal question. (Id. Attach. #1 Mem. P. & A.
9 2.) The warden also asserts that ground two should be denied
10 because there was sufficient evidence to support Petitioner's
11 kidnapping conviction, and the state courts' rejection of his claim
12 was not contrary to, or an unreasonable application of, federal
13 law. (Id. at 3.)

14 Harvey filed a Traverse on February 17, 2011 [ECF No. 7].
15 There, Petitioner concedes that he failed to exhaust the
16 allegations in ground one, but asks the Court to still consider the
17 merits of ground one or, in the alternative, stay his Petition so
18 he may exhaust his state remedies. (Traverse 1-3, ECF No. 7.)
19 Petitioner continues to assert that he is entitled to habeas relief
20 for his claim in ground two. (Id.)

21 The Court has reviewed the Petition, Respondent's Answer and
22 lodgments, and Harvey's Traverse. For the reasons discussed below,
23 the Petition should be **DENIED**.

24 I. FACTUAL BACKGROUND

25 In March 2008, Virginia Rodgers, an escort, advertised her
26 services on Craig's list. (Lodgment No. 2, Rep.'s Tr. Appeal vol.
27 4, 199-200, Nov. 18, 2008.) At approximately 2:30 a.m., on March
28 11, 2008, Rodgers received a phone call from a man who said his

1 name was, "Chris." (Id. at 201.) Rodgers later identified him as
2 Michael Harvey. (Id. at 211.) Harvey attempted to set up a date
3 with Rodgers, and he asked her to meet him at an apartment in El
4 Cajon, California. (Id. at 201-02.) Rodgers agreed. (Id. at
5 202.)

6 Rodgers called her boyfriend, Marcel Crowel, to get a ride to
7 the apartment complex. (Id. at 203-04.) Crowel did not know that
8 Rodgers was a prostitute and claims that he was unaware that he was
9 driving her to a date. (Id. at 204.) Rodgers called Harvey a
10 couple of times to let him know she was on the way. (Id. at 202-
11 03.) After arriving, Crowel parked his truck in the parking lot of
12 the complex; Rodgers had a difficult time locating Harvey's
13 apartment, so she called Harvey again, and he told her to meet him
14 by the pool area. (Id. at 205.) Harvey arrived at the pool a few
15 minutes after Rodgers. (Id.) As the two of them walked toward the
16 apartment, Harvey said, "You thought I was a trick. I'm a pimp and
17 you know what this is." (Id. at 206.) While Harvey said this, he
18 pulled out a gun, pointed it at Rodgers, and demanded money. (Id.)
19 When Rodgers told Harvey that she did not have any money, Harvey
20 replied, "Well, it's going to be a long night and we could go for a
21 ride. It'd be a pimp with a dead ho on their hands." (Id. at
22 207.)

23 As the two of them approached apartment 128, Rodgers stopped
24 because she was afraid what might happen if she went inside
25 Harvey's apartment. (Id. at 208.) She told Harvey that she had
26 some money in her car; they both began walking towards the parking
27 lot where Crowel was waiting in his truck for Rodgers, even though
28 Rodgers did not have any money in her vehicle. (Id. at 208-09.)

1 While they were walking, Rodgers asked Harvey why he was so angry
2 and Harvey replied, "cause bitches like [Rodgers] disrespect the
3 game. We don't know what we are doing because we are independent."
4 (Id. at 210.) When Rodgers reached the sidewalk, she ran towards
5 Crowel's car in an attempt to escape, but Harvey shot Rodgers as
6 she ran, hitting the right side of her face. (Id. at 210-11.)
7 Despite being shot, Rodgers continued towards Crowel's truck. (Id.
8 at 212.)

9 Once Rodgers got into Crowel's truck, Crowel drove away.
10 (Id.) Rodgers told Crowel to drop her off at a gas station because
11 she did not want to get him in trouble, as he was on parole. (Id.)
12 Crowel dropped Rodgers off next to a Shell gas station, where
13 Rodgers told the gas station attendant, Roy Purcell, that she had
14 been shot and needed help. (Id. at 175, 213.) Purcell noticed a
15 large distortion on the right side of Rodgers's face and he called
16 an ambulance. (Id.)

17 As a result of the gunshot wound, Rodgers sustained a
18 fractured jaw and her jaw was wired shut for two months. (Id. at
19 215.) On April 17, 2008, Rodgers positively identified Harvey in a
20 photo lineup. (Id. at 220-21.) On the same day, Officer Bueno met
21 Rodgers at the apartment, and Bueno measured the distance from the
22 pool to apartment 128 as well as from the apartment to where
23 Rodgers was shot. (Id. at 231-33.) The distance from where Harvey
24 pulled a gun on Rodgers and where the shooting occurred was 689
25 feet, and the distance from where Harvey and Rodgers met by the
26 pool to the parking lot was 697 feet. (Id. vol. 5, 319, Nov. 19,
27 2008.)
28

1 The defense theory at trial was that Crowel shot Rodgers, not
2 Harvey, and that Crowel later cleaned his truck to hide the
3 evidence. (Id. at 225-26; id. vol. 6, 610-11, Nov. 20 & 21, 2008.)
4 Defense counsel implied that Crowel was, in fact, Rodgers's pimp
5 and that Crowel shot her because she did not return to the truck
6 with his money. (Lodgment No. 2, Rep.'s Tr. vol. 6, 615.) The
7 trial court instructed the jury on the consent element of
8 kidnapping for robbery, but did not include a specific instruction
9 explaining withdrawn consent. (Lodgment No. 1, Clerk's Tr. vol. 1,
10 69-70.)

11 II. PROCEDURAL BACKGROUND

12 On November 21, 2009, a jury found Harvey guilty of
13 premeditated attempted murder, kidnapping for robbery, and
14 attempted robbery. (Id. at 79-85.) Harvey was sentenced to state
15 prison for two life terms with the possibility of parole, plus
16 fifty years-to-life, and five years. (Id. at 183-86.)

17 Harvey filed a notice of appeal on January 20, 2009. (Id. at
18 187.) The California Court of Appeal, Fourth Appellate District,
19 Division One, upheld Harvey's kidnapping for robbery and attempted
20 robbery convictions, but reversed his attempted murder conviction
21 because of an erroneous jury instruction. (Lodgment No. 5, People
22 v. Harvey, No. D054498, slip op. at 17 (Cal. Ct. App. Sept. 24,
23 2009).)

24 Harvey appealed to the California Supreme Court on October 29,
25 2009. (Lodgment No. 6, People v. Harvey, No. S177443 (Cal. filed
26 Oct. 29, 2009) (petition for review at 1).) There, Harvey
27 challenged the sufficiency of the evidence to convict him of
28 aggravated kidnapping for robbery based on the instruction given to

1 the jury. (Id. at 5.) The California Supreme Court denied review
2 without opinion on December 2, 2009. (Lodgment No. 7, People v.
3 Harvey, No. S177443, slip op. at 1 (Cal. Dec. 2, 2009).) On
4 October 27, 2010, Harvey filed this Petition for Writ of Habeas
5 Corpus [ECF No. 1].

6 III. STANDARD OF REVIEW

7 Harvey's Petition is subject to the Antiterrorism and
8 Effective Death Penalty Act (AEDPA) of 1996 because it was filed
9 after April 24, 1996. 28 U.S.C.A. § 2244 (West 2006); Woodford v.
10 Garceau, 538 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S.
11 320, 326 (1997)). AEDPA sets forth the scope of review for federal
12 habeas corpus claims:

13 The Supreme Court, a justice thereof, a circuit
14 judge, or a district court shall entertain an application
15 for a writ of habeas corpus in behalf of a person in
16 custody pursuant to the judgment of a State court only on
the ground that he is in custody in violation of the
Constitution or laws of the United States.

17 28 U.S.C.A. § 2254(a) (West 2006); see also Reed v. Farley, 512
18 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th
19 Cir. 1991).

20 To present a cognizable federal habeas corpus claim, a state
21 prisoner must allege his conviction was obtained in violation of
22 the Constitution or laws of the United States. 28 U.S.C.A §
23 2254(a). In other words, a petitioner must allege the state court
24 violated his federal constitutional rights. Hernandez, 930 F.2d at
25 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhald
26 v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

27 A federal district court does "not sit as a 'super' state
28 supreme court" with general supervisory authority over the proper

1 application of state law. Smith v. McCotter, 786 F.2d 697, 700
 2 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780
 3 (1990) (holding that federal habeas courts must respect state
 4 court's application of state law); Jackson, 921 F.2d at 885
 5 (concluding federal courts have no authority to review a state's
 6 application of its law). Federal courts may grant habeas relief
 7 only to correct errors of federal constitutional magnitude.
 8 Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir. 1989)
 9 (stating that federal courts are not concerned with errors of state
 10 law unless they rise to the level of a constitutional violation).

11 In 1996, Congress "worked substantial changes to the law of
 12 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
 13 1997). Amended section 2254(d) now reads:

14 An application for a writ of habeas corpus on behalf
 15 of a person in custody pursuant to the judgement of a
 16 State court shall not be granted with respect to any
 claim that was adjudicated on the merits in State court
 proceedings unless the adjudication of the claim --

17 (1) resulted in a decision that was contrary to, or
 18 involved an unreasonable application of, clearly
 established Federal law, as determined by the
 Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an
 20 unreasonable determination of the facts in light of
 the evidence presented in the state court
 21 proceeding.

22 28 U.S.C.A § 2254(d).

23 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003),
 24 stated that "AEDPA does not require a federal habeas court to adopt
 25 any one methodology in deciding the only question that matters
 26 under section 2254(d)(1) -- whether a state court decision is
 27 contrary to, or involved an unreasonable application of, clearly
 28 established Federal law." Id. at 71 (citation omitted). A federal

1 court is therefore not required to review the state court decision
2 de novo, but may proceed directly to the reasonableness analysis
3 under § 2254(d)(1). Id.

4 The "novelty" in § 2254(d)(1) is "the reference to 'Federal
5 law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd
6 on other grounds, 521 U.S. 320 (1997) (emphasis in original
7 deleted). Section 2254(d)(1) "explicitly identifies only the
8 Supreme Court as the font of 'clearly established' rules." (Id.)
9 "[A] state court decision may not be overturned on habeas corpus
10 review, for example, because of a conflict with Ninth Circuit-based
11 law." Moore, 108 F.3d at 264. "[A] writ may issue only when the
12 state court decision is 'contrary to, or involved an unreasonable
13 application of,' an authoritative decision of the Supreme Court."
14 Id. (citing Childress v. Johnson, 103 F.3d 1221, 1224-26 (5th Cir.
15 1997); Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); see
16 Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

17
18 Furthermore, with respect to the factual findings of the trial
19 court, AEDPA provides:

20 In a proceeding instituted by an application for a
21 writ of habeas corpus by a person in custody pursuant to
22 the judgement of a State court, a determination of a
23 factual issue made by a State court shall be presumed to
24 be correct. The applicant shall have the burden of
25 rebutting the presumption of correctness by clear and
26 convincing evidence.

27 28 U.S.C.A. § 2254(e)(1).

28 IV. DISCUSSION

29 In his Petition, Harvey raises two grounds for relief. In
30 ground one, he claims that the trial court erred in admitting
31 evidence of his parole status. (Pet. 6-8, ECF No. 1.) In ground

two, the Petitioner contends that there was insufficient evidence to convict him of aggravated kidnapping for robbery under the theory presented to the jury. (Id. at 9-12.)

A. Respondent Edmund G. Brown, Jr.

Harvey names both Warden Gonzales and former-Attorney General Edmund G. Brown, Jr. as Respondents. (Pet. 1, ECF No. 1.) Respondent Gonzales argues that the Attorney General for the State of California is an improper party and should be dismissed. (Answer 1 n.1, ECF No. 6.)

On federal habeas review, a prisoner must name as respondent the state officer who has custody of him. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C.A. foll. § 2254). Federal courts lack personal jurisdiction when the petitioner fails to name a proper respondent. See id. Although the warden is the typical respondent, "the rules following section 2254 do not specify the warden." Id. "[T]he 'state officer having custody' may be 'either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.'" Id. (citation omitted). Nonetheless, if a petitioner is in custody due to a state conviction he is challenging, he must name the state officer who has official custody of him as the respondent. Id. (quotation omitted).

"[A] petitioner may not seek [a writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the] custodian [of the petitioner] must be the respondent." Ashley v. Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian of the state

1 prisoner, the person who will produce "the body" if directed to do
2 so by the court. "Both the warden of a California prison and the
3 Director of Corrections for California have the power to produce
4 the prisoner." Ortiz-Sandoval, 81 F.3d at 895.

5 Here, Harvey names Warden Gonzales, who is a proper
6 Respondent. Former-Attorney General Edmund G. Brown, however, is
7 not a proper Respondent and should be **DISMISSED** with prejudice for
8 the reasons stated above.

9 **B. Ground One: Evidentiary Error**

10 The Petitioner alleges in ground one that the trial court
11 erred in admitting evidence that Harvey was on parole at the time
12 of the charged crimes, in violation of his due process right to a
13 fair trial. (Pet. 6, ECF No.1.) In particular, Harvey's parole
14 agent at the time the crimes were committed was permitted to
15 testify at trial regarding whether Petitioner owned the telephone
16 that was used to call Rodgers. (See id. at 6-7.) Because the
17 word, "parole," is inflammatory and prejudicial, Harvey contends
18 that the evidentiary error violates his federal constitutional
19 right to due process of law. (Id. at 6.)

20 In his Answer, Respondent Gonzales asserts that Harvey failed
21 to exhaust the claim because although he presented it on direct
22 appeal to the court of appeal, he did not raise the issue in his
23 petition to the California Supreme Court. (Answer Attach. #1 Mem.
24 P. & A. 2, ECF No. 6.) Even if the Court considered the merits of
25 ground one, Respondent alleges, the claim fails because it does not
26 present a federal question. (Id.)

1 **1. Exhaustion**

2 Before a federal court may grant habeas relief on a claim, a
 3 petitioner must exhaust all available state judicial remedies. 28
 4 U.S.C.A. § 2254(b)(1)(A); Rhines v. Weber, 544 U.S. 269, 273-74
 5 (2005). A claim is exhausted only when a petitioner has fairly
 6 presented it to the state courts. Duncan v. Henry, 513 U.S. 364,
 7 365 (1995) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). To
 8 meet the fair presentation requirement, the petitioner must "alert
 9 the state courts to the fact that he [is] asserting a claim under
 10 the United States Constitution." Hiivala v. Wood, 195 F.3d 1098,
 11 1106 (9th Cir. 1999) (citing Duncan, 513 U.S. at 365-66). The
 12 petitioner must "provide the state courts with a 'fair opportunity'
 13 to apply controlling legal principles to the facts bearing upon his
 14 constitutional claim." Anderson v. Harless, 459 U.S. 4, 6 (1982)
 15 (citing Picard v. Connor, 404 U.S. at 276-77). By giving state
 16 courts the "'opportunity to pass upon and correct' alleged
 17 violations of its prisoners' federal rights," comity is promoted,
 18 and disruption of state judicial proceedings is prevented. Duncan,
 19 513 U.S. at 365 (quoting Picard, 404 U.S. at 275); see also Rose,
 20 455 U.S. at 518; Fields v. Waddington, 401 F.3d 1018, 1020 (9th
 21 Cir. 2005).

22 Constitutional claims raised in federal proceedings must be
 23 presented to the state courts first. Baldwin v. Reese, 541 U.S.
 24 27, 31-32 (2004). A petitioner must provide the highest state
 25 court with a fair opportunity to consider the factual and legal
 26 bases of his claims before presenting them to the federal court.
 27 Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999) (citing
 28 Picard, 404 U.S. at 276; Johnson v. Zenon, 88 F.3d 828, 829 (9th

1 Cir. 1996); see also Duncan, 513 U.S. at 365; Scott v. Schriro, 567
2 F.3d 573, 582 (9th Cir. 2009); Davis v. Silva, 511 F.3d 1005, 1008
3 (9th Cir. 2008). A claim is not exhausted if it is pending before
4 the state's highest court. See Rose, 455 U.S. at 515 ("[A]s a
5 matter of comity, federal courts should not consider a claim in a
6 habeas corpus petition until after the state courts have had an
7 opportunity to act"); Anderson v. Morrow, 371 F.3d 1027,
8 1036 (9th Cir. 2004) ("AEDPA's exhaustion requirement entitles a
9 state to pass on a prisoner's federal claims before the federal
10 courts do so."). "It follows, of course, that once the federal
11 claim has been fairly presented to the state courts, the exhaustion
12 requirement is satisfied." Picard, 404 U.S. at 275.

13 In his Traverse, Harvey concedes that he did not exhaust his
14 state court remedies as to ground one. (Traverse 1-2, ECF No. 7.)
15 Nonetheless, Petitioner urges the Court to consider the claim on
16 the merits and grant him habeas corpus relief. (Id.)
17 Alternatively, he requests that the Court give him leave to exhaust
18 the evidentiary error claim. (Id. at 2.) Gonzales and Harvey
19 therefore agree that Harvey failed to exhaust his evidentiary claim
20 for ground one because he did not raise the issue in his petition
21 to the California Supreme Court.

22 On January 20, 2009, the Petitioner filed a notice of appeal
23 with the California Court of Appeal. (Lodgment No. 1, Clerk's Tr.
24 vol. 1, 187.) In his appeal, Harvey argued that the trial court
25 erred in admitting evidence of his parole status, that there is
26 insufficient evidence to uphold Harvey's kidnapping for robbery
27 conviction on the theory presented to the jury, and that the court
28 gave improper jury instructions for attempted murder. (Lodgment

1 No. 3, Appellant's Opening Brief at 1-2, People v. Harvey, No.
2 D054498 (Cal. Ct. App. filed May 26, 2009).) The court of appeal
3 reversed the attempted murder conviction, but upheld the other
4 convictions. (Lodgment No. 5, People v. Harvey, No. D054498, slip
5 op. at 17.)

6 Harvey then appealed to the California Supreme Court on
7 October 29, 2010. (Lodgment No. 6, People v. Harvey, No. S177443
8 (petition for review at 1).) There, Harvey alleged that his
9 kidnapping-for-robbery conviction should be reversed because there
10 was insufficient evidence and that the trial court failed to
11 provide the jury with an instruction on withdrawn consent. (Id. at
12 5.) Harvey did not raise the evidentiary error claim regarding the
13 trial court's decision to permit the admission of evidence of
14 Harvey's parole status. The Petitioner failed to exhaust the
15 evidentiary error claim because he did not raise the issue with the
16 California Supreme Court, as required. See Weaver, 197 F.3d at
17 364.

18 Nevertheless, the Court may deny an application for habeas
19 relief on the merits even if the petitioner has not yet exhausted
20 his state judicial remedies. 28 U.S.C.A. § 2254(b)(2). "[A]
21 federal court may deny an unexhausted petition on the merits only
22 when it is perfectly clear that the applicant does not raise even a
23 colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 623-24
24 (9th Cir. 2005). To that end, this Court will consider the merits
25 of ground one.

26 **2. Whether ground one should be denied on the merits**

27 Harvey's allegation is that the trial court erred when it
28 allowed the introduction of evidence that Petitioner was on parole

1 at the time of the charged crimes because the word, "parole," is
2 prejudicial. (Pet. 6, ECF No. 1.) Harvey maintains that during
3 the prosecutor's opening statement, the district attorney used the
4 word "parole" repeatedly. (Id. at 7.) Also, when Petitioner's
5 parole agent at the time, Parole Agent Fonte, was ready to testify,
6 the attorneys discussed with the trial court whether Fonte should
7 be permitted to introduce himself as Harvey's then-parole agent.
8 (See id.) Harvey alleges that the trial judge agreed that the term
9 "parole" was inflammatory, but when the district attorney told the
10 judge about Fonte's limited availability, the judge allowed Fonte
11 to inform the jury that he was Harvey's parole agent because it
12 gave Fonte's testimony credibility. (Id.) Thus, even if the judge
13 did not permit Fonte to reveal that he was a parole agent, the jury
14 was still tainted by the prosecutor's use of the word, "parole,"
15 during opening statements. (Id.)

16 Further, Harvey posits the people already had sufficient proof
17 that the calls placed to Rodgers on the night of the incident were
18 made from Harvey's telephone. (Id.) Fonte's testimony was
19 therefore cumulative because Petitioner had the phone on his person
20 when he was arrested, and the people had an interrogation video in
21 which Harvey and the interrogating officer discuss the phone
22 because it kept ringing during the interrogation. (Id.)
23 Petitioner asserts that if the jurors were not informed of Harvey's
24 parole status, the outcome would have been different. (See id. at
25 6-8.) Petitioner insists that he was deprived of his
26 constitutional right to a fair trial. (Id. at 6.)

27 The warden argues in his Answer that even if the Court
28 considers the merits of Petitioner's unexhausted claim, the

1 allegation should be denied because it does not raise a federal
2 question. (Answer Attach. #1 Mem. P. & A. 2-3, ECF No. 6.)
3 Respondent asserts that Harvey is challenging the state courts'
4 application of the California Evidence Code, and Petitioner fails
5 to reference the Constitution or any federal law. (Id. at 3
6 (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)).)

7 In his Traverse, Petitioner clarifies that his federal due
8 process right to a fair trial was violated when the trial court
9 allowed evidence of his parole status at trial. (Traverse 1, ECF
10 No. 7.) Harvey maintains that the Court should consider the merits
11 of his claim and grant him relief or stay his Petition so that he
12 can exhaust his state remedies. (Id. at 1-2.)

13 "In conducting habeas review, a federal court is limited to
14 deciding whether a conviction violated the Constitution, laws or
15 treaties of the United States." Estelle, 502 U.S. at 68; 28
16 U.S.C.A. § 2254(a). Habeas relief is not available for an alleged
17 error in the interpretation or application of state law. Estelle,
18 502 U.S. at 67-68; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th
19 Cir. 1991); O'Brenski v. Maass, 915 F.2d 418, 423 (9th Cir. 1990).
20 To obtain federal habeas relief, a petitioner must allege a
21 deprivation of federal rights. Kealohapauole v. Shimoda, 800 F.2d
22 1463, 1465 (9th Cir. 1986). "[F]ailure to comply with the state's
23 rules of evidence is neither necessary nor a sufficient basis for
24 granting habeas relief." Jammal, 926 F.2d at 919.

25 Indeed, if Harvey merely challenged the state court's
26 application of state rules of evidence, he would not have alleged a
27 deprivation of federal rights. Yet, Petitioner explicitly asserts
28 that the admission of evidence indicating that he was on parole at

1 the time of the incident deprived him of due process, which is a
2 cognizable claim under § 2254. (Pet. 6, ECF No. 1 (arguing that
3 the evidentiary ruling violated his "rights 'to a fair and proper
4 trial.'")); see Gutierrez v. Griggs, 695 F.2d 1195, 1198 (9th Cir.
5 1983). Therefore, the Court's inquiry is whether the state courts'
6 rejection of Harvey's due process claim regarding the admission of
7 evidence of his parole status was objectively unreasonable.

8 "The Due Process Clause guarantees the fundamental elements of
9 fairness in a criminal trial." Spencer v. Texas, 385 U.S. 554,
10 563-64 (1967). "Denial of due process in a criminal trial 'is the
11 failure to observe that fundamental fairness essential to the very
12 concept of justice we must find that the absence of that
13 fairness fatally infected the trial; the acts complained of must be
14 of such quality as necessarily prevents a fair trial.'" Kealohapauole,
15 800 F.2d at 1466 (citation omitted). "The admission
16 of evidence does not provide a basis for habeas relief unless it
17 rendered the trial fundamentally unfair in violation of due
18 process." Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995)
19 (citing Estelle, 502 U.S. at 67-68); see Karis v. Calderon, 283
20 F.3d 1117, 1129 n.5 (9th Cir. 2002); see also Lopes v. Campbell,
21 408 F. App'x 13, 16 (9th Cir. 2010). Consequently, a habeas
22 petitioner "bears a heavy burden in showing a due process violation
23 based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159,
24 1172 (9th Cir. 2005).

25 AEDPA further restricts this standard. In Holley v.
26 Yarborough, 568 F.3d 1091 (9th Cir. 2009), the Ninth Circuit
27 determined:
28

1 Under AEDPA, even clearly erroneous admissions of
2 evidence that render a trial fundamentally unfair may not
3 permit the grant of federal habeas corpus relief if not
4 forbidden by "clearly established Federal law," as laid
5 out by the Supreme Court. In cases where the Supreme
6 Court has not adequately addressed a claim, this court
7 cannot use its own precedent to find a state court ruling
8 unreasonable.

9 The Supreme Court has made very few rulings
10 regarding the admission of evidence as a violation of due
11 process. Although the Court has been clear that a writ
12 should be issued when constitutional errors have rendered
13 the trial fundamentally unfair, it has not yet made a
14 clear ruling that admission of irrelevant or overtly
15 prejudicial evidence constitutes a due process violation
16 sufficient to warrant issuance of the writ. Absent such
17 "clearly established Federal law," we cannot conclude
18 that the state court's ruling was an "unreasonable
19 application."

20 Holley, 568 F.3d at 1101 (internal citations omitted); see also
21 Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2008).

22 When reviewing a state court decision, federal courts must
23 look to the last reasoned state court decision as the basis of the
24 judgment. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007)
25 (citing Benson v. Terhune, 304 F.3d 874, 880 n.5 (9th Cir. 2002)).
26 Because Harvey did not present the evidentiary error claim to the
27 state supreme court, as discussed, this Court will look to the
28 appellate court's decision to determine whether it was "contrary
to" or an "unreasonable application" of clearly established federal
law. See id.; see also Williams v. Taylor, 529 U.S. 362, 412-13
(2000).

"A state court decision is contrary to clearly established
federal law if the state court either applies a rule that
contradicts the governing law set forth by the Supreme Court or
arrives at a different result when confronted by a set of facts
that are materially indistinguishable from a decision of the

Supreme Court." Sims v. Rowland, 414 F.3d 1148, 1151 (9th Cir. 2005) (citing Williams, 529 U.S. at 405-06); see also Butler, 528 F.3d at 640. A state court decision is an unreasonable application of federal law when it applies Supreme Court precedent in an objectively unreasonable manner, or unreasonably fails to extend the legal principles of a Supreme Court decision to situations which it should have controlled. Sims, 414 F.3d at 1152 (citing Brown v. Payton, 544 U.S. 133, 141 (2005); Ramdass v. Angelone, 530 U.S. 156, 166 (2000)); see also Butler, 528 F.3d at 640.

When ruling on Harvey's direct appeal, the California Court of Appeal recited the following relevant facts:

After his arrest, Harvey told investigators that he knew nothing about the shooting. When investigators confronted Harvey with cell phone records showing that calls had been placed to Rodgers before the crime from his cell phone, he gave a variety of explanations, including that his cell phone had been lost or stolen. Before trial, the prosecutor informed the trial court that he intended to introduce Rodgers's and Harvey's cell phone records to prove that Harvey had spoken to Rodgers before the crime. To undercut Harvey's defense that his cell phone had been lost or stolen, the prosecutor sought to introduce evidence from Harvey's parole agent, Mark Fonte, linking Harvey to the cell phone number used in the crime.

When the prosecutor inquired whether he could disclose to the jury that Harvey was on parole when the shooting occurred, the trial court indicated that the relationship between Fonte and Harvey gave credibility to the exchange, but that it would consider a limiting instruction telling the jury not to speculate why Harvey was on parole. Defense counsel argued that he would not challenge the credibility of Fonte's testimony, and suggested that the jury be told that Fonte was employed by the State of California. Although the trial court found that the word "parole" was inflammatory, it concluded that "sanitiz[ing]" the information removed its credibility. The trial court concluded that the probative value of the information outweighed any prejudice, but agreed to provide the jury with a limiting instruction.

1 When the prosecution called Fonte as a witness,
2 defense counsel objected on relevance and Evidence Code
3 section 352 grounds. The trial court again concluded
4 that the word "parole" added credibility and was not so
5 inflammatory that it needed to be excluded. Although
6 defense counsel offered to work out a stipulation, and
7 the trial court suggested taking the witness out of order
8 to allow counsel the time to prepare a stipulation, the
9 prosecutor rejected the suggestion because Fonte was
10 ready to testify and had another appointment that day.
11 Defense counsel moved for a mistrial after Fonte
12 testified that he was a parole agent. When the trial
13 court denied the motion, defense counsel did not ask for
14 a limiting instruction and the trial court did not
15 provide one. Fonte testified that one of his duties as a
16 parole agent was to supervise Harvey, and that Harvey had
17 given him a cell phone number sometime within a couple of
18 weeks before the shooting that matched the number used to
19 call Rodgers.

20 (Lodgment No. 5, People v. Harvey, No. D054498, slip op. at 3-5.)

21 The appellate court conceded that information regarding
22 Harvey's parole status was prejudicial because it informed the jury
23 that Harvey had been incarcerated at some point for an unknown
24 crime. (Id. at 5.) Even so, the court found no error, stating the
25 following:

26 While we may have handled the matter differently,
27 such as encouraging the parties to work out a stipulation
28 in the time they had before trial commenced, we cannot
conclude that the trial court's ruling amounted to an
abuse of discretion. Harvey's status as a parolee, while
prejudicial, did not tend to evoke an emotional bias
against him as an individual apart from what the facts
proved. Although the prejudicial impact of this evidence
could have been minimized by a limiting instruction,
defense counsel neglected to remind the court to give
such an instruction. (Evid. Code, § 355 ["the court upon
request shall restrict the evidence to its proper scope
and instruct the jury accordingly"].)

29 Finally, although the general thrust of Fonte's
30 testimony was cumulative of the testimony regarding the
31 cell phone records, it provided additional context to
32 assist the jury in understanding and evaluating the cell
33 phone record testimony. Moreover, Fonte's testimony was
34 brief and did not unduly consume time.

1 Even assuming the trial court erred by permitting
 2 Fonte's testimony regarding Harvey's parole status, we
 3 conclude that reversal is not required since it is not
 4 reasonably probable that, absent the introduction of the
 5 challenged testimony, Harvey would have received a more
 6 favorable result. (*People v. Watson* (1956) 46 Cal.2d
 7 818, 836; *People v. Price* (1991) 1 Cal.4th 324, 440.)
 8 Evidence of Harvey's connection to the incident was
 9 overwhelming. Rodgers picked Harvey out of a
 10 photographic lineup and later identified him at trial.
 11 The cell phone records also corroborated her testimony
 12 regarding what transpired. Although Harvey denied
 13 knowing Rodgers, he repeatedly called her a "hooker" or
 14 "prostitute" when police interviewed him. He admitted to
 15 police that he lived in the same apartment complex that
 16 Rodgers's caller had directed her to on the morning of
 17 the shooting.

18 Defense counsel tried to take advantage of Rodgers's
 19 admission that she initially lied to the police about
 20 Crowel's involvement to suggest that Crowel had fired the
 21 shot that injured Rodgers from inside his truck. The
 22 police, however, interviewed Crowel, impounded the truck
 23 he used to drive Rodgers, and presumably ruled him out as
 24 a suspect. Rodgers also testified that Crowel did not
 25 shoot her. It is not reasonably probable Harvey would
 26 have obtained a more favorable result if the court had
 27 excluded the evidence regarding his parole status.

28 (*Id.* at 6-7.)

1 Because Harvey asserts that his right to a fair trial was
 2 violated, the Court must consider whether the admission of evidence
 3 that Petitioner was on parole at the time of the incident rendered
 4 the trial "fundamentally unfair." *Jammal*, 926 F.2d at 919. AEDPA
 5 requires federal courts to defer to a state court's decision when
 6 the Supreme Court does not "'squarely address[] the issue in th[e]
 7 case' or establish a legal principle that 'clearly extend[s]' to a
 8 new context to the extent required by the Supreme Court"
 9 *Moses*, 555 F.3d at 754. As discussed, the United States Supreme
 10 Court has not explicitly held that the admission of irrelevant and
 11 prejudicial evidence constitutes a due process violation warranting
 12 federal habeas relief. *See Holley*, 568 F.3d at 1101; *Ochoa v.*

1 Harrington, No. CV 09-8649-JHN(JEM), 2011 U.S. Dist. LEXIS 131909,
2 at *39 (C.D. Cal. Aug. 4, 2011). Nor has the Supreme Court
3 expressed an opinion on whether a state law violates due process if
4 it permits the introduction of prior crimes evidence to show a
5 defendant's propensity to commit the charged offense. Estelle, 502
6 U.S. at 75 n.5. For this reason alone, it therefore cannot be said
7 that the appellate court's ruling was an unreasonable application
8 of clearly established federal law. Holley, 568 F.3d at 1101.

9 Moreover, the evidence was relevant, and there were
10 permissible inferences the jury could have drawn from Fonte's
11 testimony. Jammal, 926 F.2d at 920. "Only if there are no
12 permissible inferences the jury may draw from the evidence can its
13 admission violate due process. Even then, the evidence must 'be of
14 such quality as necessarily prevents a fair trial.'" Id. (citation
15 omitted). The prosecution introduced Officer Fonte's testimony to
16 show that the phone number from which the calls to Rodgers were
17 placed on the night of the incident matched Harvey's phone number.
18 (Lodgment No. 2, Rep.'s Tr. Appeal vol. 5, 314-18, Nov. 19, 2008.)
19 Fonte's testimony was necessary because during a police
20 interrogation, Harvey denied making the phone calls and claimed
21 that someone must have used his phone; he later said his phone was
22 stolen. (Id. at 387.) The trial court determined that evidence
23 that Fonte was Harvey's parole agent was necessary because it
24 affected the credibility of Fonte's testimony. (Id. vol. 3, 111,
25 Nov. 17, 2008.) The evidence also established how Detective Kale
26 was able to identify and locate Harvey to place him in a photo
27 lineup, which led to the positive identification by the victim.
28 (Id. at 110-111.) While Fonte's testimony may have been

1 cumulative, it gave context to the phone records and helped dispel
2 any doubt as to the identity of the caller.

3 During his opening statement, the prosecutor told the jury
4 that Harvey had a "parole agent," and they would hear from "the
5 parole agent, Mark Fonte, in regards to phone information that he
6 got from the Defendant." (Id. vol. 2, 203, 205, Nov. 18, 2008.)
7 Defense counsel did not object. (See id.) Even if this evidence
8 was improperly admitted, Petitioner has not shown that the evidence
9 had a substantial and injurious effect on the jury's verdict so as
10 to render the trial fundamentally unfair. Plascencia v. Alameida,
11 467 F.3d 1190, 1203 (9th Cir. 2006); Jammal, 926 F.2d at 920.

12 Finally, the appellate court's rejection of Harvey's claim
13 challenging the failure to give a limiting instruction was also not
14 objectively unreasonable. "Instructional error will not support a
15 petition for federal habeas relief unless it is shown not merely
16 that the instruction is undesirable, erroneous, or even universally
17 condemned, but that by itself the instruction so infected the
18 entire trial that the resulting conviction violates due process."
19 Karis v. Calderon, 283 F.3d at 1132 (internal quotation marks
20 omitted). Harvey has not demonstrated that the court's failure to
21 give a limiting instruction and tell the jury not to draw any
22 inference from the references to Petitioner's parole status
23 rendered the entire trial fundamentally unfair. See id. Harvey's
24 parole status was not admitted to prove he had the propensity to
25 commit the current crime, and the court did not allow the
26 prosecutor to discuss the prior conviction which led to Harvey's
27 parole. The evidence against Petitioner was substantial. Rodgers
28 identified him during a photographic lineup, and her testimony was

1 corroborated by cell phone records. (Lodgment No. 2, Rep.'s Tr.
2 Appeal vol. 5, 377, 383, Nov. 19, 2008.) Although Harvey denied
3 knowing Rodgers, when the police interviewed him, he repeatedly
4 called her a "hooker" or "prostitute" and admitted that he lived in
5 the same complex where she was shot. (Id. at 385, 388.) Although
6 a limiting instruction would have been proper, it was not required
7 to preserve Harvey's due process rights. See Basurto v. Luna, 291
8 F. App'x 41, 43 (9th Cir. 2008).

9 Accordingly, the state court's rejection of Petitioner's
10 evidentiary error claim in ground one was not contrary to, or an
11 unreasonable application of, clearly established federal law and
12 was not based on an unreasonable determination of the facts. 28
13 U.S.C. § 2254(d)(1)-(2). Even though it is unexhausted, ground one
14 does not warrant federal habeas relief and should be **DENIED** on the
15 merits.

16 **C. Ground Two: Sufficiency of the Evidence**

17 Harvey was convicted of kidnapping for robbery with an
18 enhancement for the personal use of a firearm resulting in great
19 bodily injury. (Lodgment No. 1, Clerk's Tr. vol. 1, 81); see Cal.
20 Penal Code §§ 209(b), 12022.53(d) (West 2012). The Petitioner
21 argues in ground two that his due process rights were violated
22 because there was insufficient evidence to uphold his kidnapping-
23 for-robbery conviction. (Pet. 11, ECF No. 1.) Harvey contends
24 that this theory of kidnapping would have required the jury to find
25 he used force or fear after Rodgers withdrew her consent. (Id. at
26 10.) Petitioner challenges the trial court's failure to give the
27 jury the last bracketed paragraph of CALCRIM No. 1203, which would
28 have instructed them on withdrawn consent. (Id.)

1 According to Harvey, there was insufficient evidence that he
2 used force or fear to move Rodgers because she initiated the
3 movement from the pool area to the apartment, as well as from the
4 apartment to the vehicle. (See id. at 9-11.) Not once did Rodgers
5 state that she went to the apartment because she was threatened or
6 went there against her will, and her statement that she did not
7 want to go inside the apartment does not indicate that she withdrew
8 her consent to the movement. (Id. at 9-10.) Petitioner alleges
9 that if Rodgers withdrew her consent, she did not do so until they
10 reached the apartment and she stopped walking; a jury could not
11 have concluded otherwise. (Id. at 9, 11.) Therefore, Harvey urges
12 that his due process rights were violated because there was
13 insufficient evidence to convict him based on a theory that was
14 never presented to the jury. (Id. at 10.)

15 In response, Gonzales argues that the appellate court
16 conducted a lengthy and detailed analysis of California law as to
17 the elements to support a conviction of kidnapping for robbery.
18 (Answer Attach. #1 Mem. P. & A. 7, ECF No. 6.) Additionally,
19 Respondent contends that the court of appeal's reasoning is amply
20 supported by the record. (Id.) Thus, Harvey cannot demonstrate
21 the appellate court decision was contrary to, or an unreasonable
22 application of, federal law. (Id.)

23 In his Traverse, Harvey argues that if no threat was made and
24 the victim consented to the movement, Petitioner's conduct was
25 merely robbery, but not kidnapping. (Traverse 3, ECF No. 7.) He
26 points out that not once did the victim attempt to escape. (Id. at
27 4.) Petitioner argues that there was insufficient evidence to find
28 him guilty beyond a reasonable doubt of two of the elements of the

1 crime - using force or fear to cause the other to move, and lack of
 2 consent. (Id. at 4-5.) Harvey reiterates that he never threatened
 3 Rodgers with force to get her to accompany him, demanded that she
 4 do so, or make her feel compelled to walk any distance; therefore,
 5 her movement could not be attributed to force or fear. (Id.)

6 "[T]he Due Process Clause protects the accused against
 7 conviction except upon proof beyond a reasonable doubt of every
 8 fact necessary to constitute the crime with which he is charged."
 9 In re Winship, 397 U.S. 358, 364 (1970). The primary inquiry in a
 10 sufficiency-of-the-evidence claim is whether a rational trier of
 11 fact could have found proof of guilt beyond a reasonable doubt.
 12 Wright v. West, 505 U.S. 277, 290 (1992); Jackson v. Virginia, 443
 13 U.S. 307, 324 (1979); Mikes v. Borg, 947 F.2d 353, 356 (9th Cir.
 14 1991). In making this determination, the court is not authorized
 15 "to 'ask itself whether it believes that the evidence at the trial
 16 established guilt beyond a reasonable doubt.'" Jackson, 443 U.S.
 17 at 318-19 (quoting Woodby v. INS, 385 U.S. 276, 282 (1966).) The
 18 court must view the evidence in the light most favorable to the
 19 prosecution and must presume the trier of fact resolved conflicting
 20 evidence in the prosecution's favor. Wright, 505 U.S. at 296;
 21 Jackson, 443 U.S. at 319, 326; Taylor v. Stainer, 31 F.3d 907, 908-
 22 09 (9th Cir. 1994). A state court's finding of sufficient evidence
 23 is given deference under AEDPA. Juan H. v. Allen, 408 F.3d 1262,
 24 1274-75 (9th Cir. 2005).

25 **1. Force or fear**

26 Where there is no reasoned decision from the state's highest
 27 court, the Court "looks through" to the underlying appellate court
 28 decision. Ylst v. Nunnemaker, 501 U.S. 797, 805-06 (1991). The

1 California Supreme Court denied review without opinion on December
2 2, 2009. (Lodgment No. 7, People v. Harvey, No. S177443, slip op.
3 at 1.) Therefore, the last reasoned state court opinion addressing
4 the force or fear issue was rendered by the California Court of
5 Appeal. (Lodgment No. 5, People v. Harvey, No. D054498, slip op.
6 at 10.) There, the court stated:

7 Harvey claims that his conviction of kidnapping for
8 robbery must be reversed because there was insufficient
9 evidence that Rodgers's movement from the pool area to
10 the apartment, or from the apartment to the parking lot,
11 was the product of force or fear. He argues that, based
12 on Rodgers's own testimony, she voluntarily took a few
13 steps to the apartment before he displayed the gun and
14 there is no evidence of lack of consent for this
15 movement. He also claims there is no evidence that he
16 used force or fear to move Rodgers from the apartment to
17 the parking lot because she initiated that movement.
18 Harvey notes that the court did not instruct on
19 withdrawal of consent and argues that the judgment cannot
20 be affirmed on a theory for which the jury received no
21 instructions. We disagree.

22 As a threshold matter, Harvey challenges only the
23 force or fear element of kidnapping for robbery.
24 Accordingly, we do not discuss the evidence supporting
25 the remaining elements of the crime.

26 Harvey correctly notes that the prosecutor did not
27 divide the movement into two discrete segments. Rather,
28 the prosecutor argued that the asportation element of
kidnapping was the movement from the pool area where
Harvey drew his gun to where Rodgers was shot, a distance
of over 600 feet. Here, the attempted robbery and the
kidnapping began after Harvey displayed his gun, demanded
money and stated, "Well, it's going to be a long night
and we could go for a ride. It'd be a pimp with a dead ho
on their hands." (*People v. Camden* (1976) 16 Cal.3d 808,
814 [Even if "the victim has at first willingly
accompanied the accused, the latter may nevertheless be
guilty of [kidnapping] if he subsequently restrains his
victim's liberty by force and compels the victim to
accompany him further."]; *People v. Trawick* (1947) 78
Cal.App.2d 604, 606 ["It is not necessary that the
original accompaniment of the abductor be involuntary, if
subsequently there is an enforced restraint of
liberty"].)

Harvey's action and statements were sufficient to
put a person in fear for her personal safety. A

1 reasonable jury could infer that any movement Rodgers
 2 made after Harvey displayed his gun was based on his
 3 implied threat of force. The reasonableness of such an
 inference is supported by Harvey's use of potentially
 deadly force as soon as Rodgers attempted to escape.

4

5 When all of the facts and circumstances are viewed
 6 together and in the light most favorable to the judgment,
 7 there is more than enough evidence from which a jury
 could find Harvey guilty of kidnapping for purposes of
 robbery.

8 (Id. at 9-10.)

9 In California, kidnapping for robbery consists of the
 10 following elements: (1) The defendant intended to commit the
 11 robbery; (2) with that intent, the defendant used force or
 12 instilled a reasonable fear to take or detain another person; (3)
 13 using that force or fear, the defendant made the other person move
 14 a substantial distance; (4) the other person was made to move a
 15 distance beyond that merely incidental to the commission of the
 16 robbery; and (5) the other person did not consent to the movement;
 17 (6) the defendant did not reasonably believe that the other person
 18 consented to the movement. See People v. Curry, 158 Cal. App. 4th
 19 766, 781, 70 Cal. Rptr. 3d 257, 270 (2007); see also Cal. Penal
 20 Code § 209(b)(1).

21 Kidnapping generally must be against the victim's will.
 22 People v. Hill, 23 Cal. 4th 853, 855, 3 P.3d 898, 899, 98 Cal.
 23 Rptr. 2d 254, 255 (2000). "[A] general act of kidnap[ing] . . .
 24 can only be accomplished by the use or threat of force." People v.
 25 Rhoden, 6 Cal. 3d 519, 527, 492 P.2d 1143, 1148, 99 Cal. Rptr. 751,
 26 756 (1972). Even if a victim's cooperation is first obtained
 27 without force or threat of force, a defendant has committed
 28 kidnapping if he "subsequently restrains his victim's liberty by

1 force and compels the victim to accompany him further." People v.
2 Hovarter, 44 Cal. 4th 983, 1017, 189 P.3d 300, 325, 81 Cal. Rptr.
3 3d 299, 330 (2008); see People v. Trawick, 78 Cal. App. 2d 604,
4 606, 178 P.2d 45, 47 (Cal. App. 1947) (explaining that initially
5 accompanying of the abductor need not be involuntary, so long as
6 there is "an enforced restraint of liberty[]"). "[M]ovement is
7 forcible where it is accomplished through the giving of orders
8 which the victim feels compelled to obey because he or she fears
9 harm or injury from the accused and such apprehension is not
10 unreasonable under the circumstances." Hovarter, 44 Cal. 4th at
11 1017, 189 P.3d at 325, 81 Cal. Rptr. 3d at 330.

12 Here, the California Court of Appeal's rejection of Harvey's
13 sufficiency-of-the-evidence claim was not contrary to, or an
14 unreasonable application of, clearly established federal law. The
15 evidence indicates that the kidnapping began once Harvey brandished
16 his weapon, demanded money, and said to Rodgers, "Well, it's going
17 to be a long night and we could go for a ride. It'd be a pimp with
18 a dead ho on their hands." (See Lodgment No. 2, Rep.'s Tr. Appeal
19 vol. 4, 207); Trawick, 78 Cal. App. 2d at 606, 178 P.2d at 47.
20 Rodgers testified that Harvey was slightly in front of her and that
21 both she and he walked from the pool area toward the apartment
22 together before Harvey pulled out the gun. (Lodgment No. 2, Rep.'s
23 Tr. Appeal vol. 4, 242-43.)

24 While Rodgers did move from the pool area toward the apartment
25 before Harvey pulled his weapon, her continuing movement to the
26 apartment was due to fear and the implied threat to keep moving. A
27 reasonable person would not feel free to stop or deviate from the
28 original course after Harvey brandished his weapon and made the

1 threat. See Hovarter, 44 Cal. 4th at 1017, 189 P.3d at 325, 81
2 Cal. Rptr. 3d at 330. Viewing the evidence in the light most
3 favorable to the prosecution, a rational trier of fact could have
4 found that Rodgers's continued movement toward Harvey's chosen
5 location - the apartment - was due to force or fear.

6 Likewise, the movement from the apartment to the parking lot
7 occurred under the same implied threat of force. Although Rodgers
8 initiated the movement to the parking lot, the record reflects that
9 she did so on Harvey's directive to produce money or else they
10 would "go for a ride" and there would be "a dead ho on [Harvey's]
11 hands." (Lodgment No. 2, Rep.'s Tr. Appeal vol. 4, 207.) Rodgers
12 only moved to the parking lot because of Harvey's threat to produce
13 money or be shot. (Id. at 207-10.) The fact that Rodgers did not
14 attempt to escape is not conclusive evidence that she consented to
15 stay; fear that Harvey would shoot her while walking to the
16 apartment or parking lot is a reasonable explanation for not
17 attempting to flee.

18 For all of these reasons, a rational trier of fact could have
19 found Harvey guilty beyond a reasonable doubt of kidnapping for
20 robbery. See Wright, 505 U.S. at 290; Jackson, 443 U.S. at 324;
21 Mikes, 947 F.2d at 356. The court of appeal's rejection of
22 Harvey's sufficiency-of-the-evidence claim was therefore not
23 contrary to clearly established federal law. Moreover, the state
24 court decision was based on a reasonable determination of the
25 evidence.

26 **2. Withdrawn consent**

27 Petitioner also argues that the jury could not have based the
28 verdict on the fact that Rodgers did not consent to the movement

1 because the jury was never given a withdrawn consent instruction.
2 (Pet. 10, ECF No. 1; see Traverse 3-4, ECF No. 7.)

3 At trial, the jury was given the following instructions for
4 kidnapping for robbery:

5 The defendant is charged in Count Two with
6 kidnapping for the purpose of robbery, in violation of
7 Penal Code section 209(b)(1).

8 To prove that the defendant is guilty of this crime,
9 the People must prove that:

10 1. The defendant intended to commit robbery;

11 2. Acting with that intent, the defendant took,
12 held, or detained another person by using force or by
13 instilling a reasonable fear;

14 3. Using that force or fear, the defendant moved
15 the other person or made the other person move a
16 substantial distance;

17 4. The other person was moved or made to move a
18 distance beyond that merely incidental to the commission
19 of a robbery;

20 5. When that movement began, the defendant already
21 intended to commit robbery; [¶] AND

22 6. The other person did not consent to the
23 movement.

24 As used here, *substantial distance* means more than a
25 slight or trivial distance. The movement must have
26 substantially increased the risk of physical or
27 psychological harm to the person beyond that necessarily
28 present in the robbery. In deciding whether the movement
was sufficient, consider all the circumstances relating
to the movement.

To be guilty of kidnapping for the purpose of
robbery, the defendant does not actually have to commit
the robbery.

To decide whether the defendant intended to commit
robbery, please refer to the separate instructions that I
will give you on that crime.

(Lodgment No. 1, Clerk's Tr. Vol. 1, at 69-70.)

1 Harvey contends that the trial court should have included an
 2 additional instruction for withdrawn consent. (Pet. 10, ECF No. 1
 3 (citing CALCRIM No. 1203).) CALCRIM No. 1203 provides:

4 Consent may be withdrawn. If, at first, a person agreed
 5 to go with defendant, that consent ended if the person
 6 changed his or her mind and no longer freely and
 7 voluntarily agreed to go with or be moved by the
 8 defendant. The defendant is guilty of kidnapping if
 9 after the other person withdrew consent, the defendant
 10 committed the crime as I have defined it.

11 Judicial Council of Cal., 1 Judicial Council of California Criminal
 12 Instructions 1076, 1078 (Summer 2011 ed.) (CALCRIM No. 1203).

13 Because the California Supreme Court denied review without
 14 opinion, the last reasoned state court opinion addressing issue was
 15 that of the California Court of Appeal. Ylst, 501 U.S. at 805-06.
 16 When considering Harvey's arguments as to withdrawn consent, the
 17 appellate court stated:

18 The trial court properly instructed the jury with
 19 CALCRIM No. 1203 addressing the elements of kidnapping
 20 for robbery, including that requirement that the victim
 21 "did not consent to the movement." Notably, Harvey does
 22 not argue on appeal that the trial court refused defense
 23 counsel's request for an instruction on the defense of
 24 consent or that the trial court had a sua sponte duty to
 25 instruct on this defense. (*People v. Felix* (2001) 92
 26 Cal.App.4th 905, 911 [trial court has a sua sponte duty
 27 to instruct on the defense of consent if there is
 28 sufficient evidence to support it].) Because the trial
 court did not instruct on consent, there was no need for
 the prosecution to ask for an instruction on *withdrawal*
 of consent.

(Lodgment No. 5, People v. Harvey, No. D054498, slip op. at 10.)

"Courts have a duty to instruct on the defense's theory of the
 case 'if the theory is legally sound and evidence in the case makes
 it applicable.'" Beardslee v. Woodford, 358 F.3d 560, 577 (9th
 Cir. 2004) (citation omitted); see Matthews v. United States, 485
 U.S. 58, 63 (1988). Even so, a criminal defendant has an

1 obligation to raise defenses on his own behalf. See United States
 2 v. Echeverry, 759 F.2d 1451, 1455 (9th Cir. 1985). A defendant's
 3 right to due process is protected when the trial judge gives jury
 4 instructions that convey the defendant's theory of the case.
 5 United States v. Romm, 455 F.3d 990, 1002 (9th Cir. 2006)
 6 (quotation omitted). Instructional error will not warrant federal
 7 habeas relief unless it is shown that, by itself, the error so
 8 infected the entire trial that the resulting conviction violates
 9 due process. Karis, 283 F.3d at 1132; see Estelle, 502 U.S. at 72
 10 (noting that the instructional error must be considered in the
 11 context of the trial record and the instructions as a whole).

12 In California, the court has a sua sponte duty to instruct on
 13 a defense "if it appears that the defendant is relying on such a
 14 defense, or if there is substantial evidence supportive of such a
 15 defense and the defense is not inconsistent with the defendant's
 16 theory of the case." People v. Maury, 30 Cal. 4th 342, 424, 68
 17 P.3d 1, 60, 133 Cal. Rptr. 2d 561, 631 (2003); People v. Felix, 92
 18 Cal. App. 4th 905, 911, 112 Cal. Rptr. 2d 311, 316 (2001). Because
 19 consent may be a defense to kidnapping for robbery, CALCRIM No.
 20 1203 includes optional paragraphs to instruct on the withdrawal of
 21 consent. For withdrawn consent, the court will "[o]n request, if
 22 supported by the evidence, also give the bracketed paragraph that
 23 begins with 'Consent may be withdrawn.'" Judicial Council of Cal.,
 24 1 Judicial Council of California Criminal Instructions 1076, 1078
 25 (CALCRIM No. 1203) (emphasis added).

26 At trial, the defense theory was that Harvey was not the
 27 shooter. (Lodgment No. 2, Rep.'s Tr. Appeal vol. 5, 225-26.)
 28 Harvey's attorney inferred that Rodgers's boyfriend, Crowel, was

1 her pimp and shot Rodgers for failing to return from the date with
2 money. (Id. at 615.) Petitioner does not contend that although he
3 requested a withdrawn consent jury instruction, the court denied
4 his request. Nor does he allege that he presented the consent
5 defense at trial, and the court therefore had a duty to sua sponte
6 instruct on withdrawn consent. Because Harvey did not raise a
7 withdrawn consent defense, the court did not have a duty to sua
8 sponte instruct on withdrawn consent. Even if the court erred, it
9 is not reasonably probable that Harvey would have obtained a more
10 favorable outcome had the error not occurred.

11 The state court of appeal rejected Harvey's claim that his
12 conviction could not be based on Rodgers's failure to consent to
13 her movement at the complex. The court's decision was not contrary
14 to, or an unreasonable application of, clearly established Supreme
15 Court law. Therefore, habeas relief on the basis stated in ground
16 two should be **DENIED**.

17 V. CONCLUSION

18 As discussed above, the former-attorney general is not a
19 proper Respondent and should be **DISMISSED** from the lawsuit.

20 Harvey's evidentiary error allegation in ground one of the
21 Petition was not presented to the California Supreme Court and is
22 therefore unexhausted. Even so, the district court should DENY the
23 claim on the merits because the admission of evidence regarding
24 Harvey's parole status as trial did not render the entire
25 proceedings fundamentally unfair. Although the Petitioner
26 exhausted the sufficiency-of-the-evidence claim in ground two, the
27 district court should also **DENY** this claim. A rational trier of
28 fact could have found that Harvey moved the victim by force or

1 fear, and the trial court's failure to instruct the jury on
2 withdrawn consent did not render the entire trial fundamentally
3 unfair. The state courts' rejection of both claims was not
4 contrary to clearly established federal law or based on an
5 unreasonable determination of the facts in light of the evidence.

6 This Report and Recommendation will be submitted to United
7 States District Court Judge John A. Houston, pursuant to the
8 provisions of 28 U.S.C. § 636(b)(1). Any party may file written
9 objections with the Court and serve a copy on all parties or before
10 March 16, 2012. The document should be captioned "Objections to
11 Report and recommendation." Any reply to the objections shall be
12 served and filed on or before March 29, 2012. The parties are
13 advised that failure to file objections within the specified time
14 may waive the right to appeal the district court's order. Martinez
15 v. Yslt, 951 F.2d 1153, 1157 (9th Cir. 1991).

16
17 Dated: February 16, 2012


RUBEN B. BROOKS
United States Magistrate Judge

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19 cc: Judge Houston
20 All Parties of Record
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